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No. 82-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PROVIDENCE JOURNAL CO.,
Petitioner,

v.

HOME PLACEMENT SERVICE, INC., and
JOSEPH P. MUSCHIANO,
Respondents.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief *amicus curiae* in support of the Petition for Writ of Certiorari filed by Petitioner Providence Journal Co. Although the attorneys for Petitioner have consented to the ANPA's filing of a Brief *amicus curiae*, Respondents have withheld their consent to such filing.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1400 newspapers constituting over 90 percent of the daily and Sunday circulation and a substantial portion of the weekly circulation in the United States. Petitioner's newspaper is a member of the association.

The decision of the Court of Appeals for the First Circuit presents major issues of widespread importance to all newspapers concerning the First Amendment right to control the advertising content of their publications. The lower court decision must be reversed because it is inconsistent with free press guarantees firmly established by this Court. The choice of material published in a newspaper is a matter of editorial discretion and may not be subjected to governmental interference or regulation.

If the decision below is permitted to stand, it would result in a significant intrusion into established principles of First Amendment freedom, as well as permit an unwarranted variance from settled antitrust standards applied to the newspaper business. Thus, it would have a direct and adverse impact on ANPA's member newspapers.

ANPA seeks in its Brief *amicus curiae* to offer the Court a succinct discussion of the errors of the Court of Appeals. The arguments supplement and do not merely restate those of the Petitioner.

Wherefore, the American Newspaper Publishers Association requests this Court to grant this motion and permit ANPA to file its attached Brief *amicus curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this Brief *amicus curiae* in support of the Petition for Writ of Certiorari of the Providence Journal Co.

INTEREST OF THE *AMICUS CURIAE*

As set forth in its motion for leave to file this brief, ANPA is a non-profit association of newspapers; the organization has a significant interest in insuring that the First Amendment guarantee of a free press is not abridged.

In the decision below, the Court of Appeals failed to consider the overriding First Amendment interest which protected the Petitioner's right to refuse Respondents' advertising.

This Court has firmly established that a newspaper's determination of what it publishes is an activity fully protected by the First Amendment. Lower courts have consistently relied on the First Amendment in holding that the exercise of a publisher's discretion in rejecting advertising is lawful.

Because the decision of the Court of Appeals ignores the First Amendment and settled antitrust law, ANPA desires to present to this Court, for its assistance, ANPA's supplemental views on the important issues placed before the Court by the Petitioner for Writ of Certiorari.

STATEMENT OF THE CASE AND CONSTITUTIONAL AND STATUTORY ISSUES INVOLVED

Amicus adopts the Statement of the Case and Constitutional and Statutory Provisions Involved of Petitioner Providence Journal Co.

ARGUMENT

I. THE FIRST AMENDMENT GUARANTEES A NEWSPAPER PUBLISHER THE RIGHT TO REJECT ADVERTISING

The decision of the Court below strikes at a fundamental First Amendment principle—the right of a newspaper publisher to exert control over the content of the newspaper. The decision as to what material is or is not published in each edition is the most elemental judgment that any newspaper publishing enterprise is privileged to make.

Two central issues must be addressed in the process of reviewing the opinion of the Court below. One deals with the First Amendment ramifications of the application of the antitrust laws to newspapers. The other deals with the application of the First Amendment to acceptance or rejection of advertising.

There is no question that newspapers are subject to general business laws of uniform application. But the First Amendment cannot be ignored simply because antitrust or other general business laws are invoked. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Associated Press v. United States*, 326 U.S. 1 (1945); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969).

The constitutional delicacy of applying the antitrust laws to the press was articulated well in the 1947 report by the Commission on Freedom of the Press:

> Though there can be no question that the antitrust laws apply to the communications industry, we would point out that these laws are extremely vague. They can be very dangerous to the freedom and the effectiveness of the press. They can be used to limit voices in opposition and to hinder the process of public education.
>
> Since the Commission looks principally to the units of the press itself to take joint action to provide the diversity, quantity, and quality of information and discussion which a free society requires, it would not care to see such action blocked by the mistaken application of the antitrust laws. Commission on Freedom of the Press, *A Free and Responsible Press*, at 85 (1947).

"Grave difficulties" emerge when "we try to apply to the mass media of communication legal obligations which were developed in the very different area of railroads, gas companies and hotels, . . . [The] differences between the press and businesses generally are just as significant as the resemblances." 2 Z. Chafee, Government and Mass Communications, at 634 (1947) (hereinafter cited as "Chafee")

The Court of Appeals failed to consider any First Amendment interest; in fact, the First Amendment is not even mentioned in that Court's opinion. This failure to take into account

any First Amendment interest whatsoever alone is grounds for remand or reversal.[1]

The facts of this case cannot be treated as a mere business action unrelated to the exercise of First Amendment rights. The case deals with the basic process of publishing a newspaper.

The publisher of a daily newspaper has full responsibility for assembling the entire newspaper—for making the day's package of information interesting, useful, reliable and well-received by the newspaper's readers. Judgment and skill are required in order to do the job well.

Zechariah Chafee, writing in 1947, described the process in these terms:

> Take a newspaper. One controversial issue after another is raised by events, which must be rapidly presented in type. Fairness in dealing with each issue depends on a great many factors—available space and time, the cost of extensive investigation, judgments about the knowledge and truthfulness of informants and about the value of arguments, devotion to inner convictions, and so on. No statute enacted years ago, no order formulated weeks ago, can allow for all these factors which vary with every controversy and every significant event. They have to be balanced fast by a man on the spot with printer's ink in his blood. Any judge or official who undertook to displace the editorial staff and write the newspaper would do a miserable job even if the First Amendment did not forbid him to try. Chafee, at 643-644.

The First Amendment envisions a system in which the decision as to what articles are carried, and what advertising is

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[1] This Court, for example, frequently has returned cases to the lower courts for failure to adhere to standards aimed at preserving First Amendment rights. See, *e.g.*, *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 433 U.S. 111 (1979).

accepted, is made free from the threat of government interference.[2] If the process is not insulated from government involvement, the overall editorial process is threatened.[3] Without such insulation, there is danger that editorial decision-making may be in response to potential governmental sanction rather than in response to what reason and judgment tells an editor or publisher should be printed. *Associated Press v. United States,* supra, at 20 fn. 18 (1945).[4] Uniformly, the courts have rebuffed demands by outside parties claiming access to the advertising services of a newspaper.[5]

The rationale for First Amendment protection for a newspaper's control over its content was best articulated by this Court in its landmark holding in *Miami Herald Publishing Co.*

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[2] The advertising content of a newspaper is entitled to First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[3] This Court has noted "the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government." *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 382 (1973). The Court's ruling in *Pittsburgh Press*, upholding a restriction upon the use of gender-designated classified advertising, turned upon the illegality of the commercial activity itself—i.e., aiding unlawful employment practices. This narrow exception cannot be widened to encompass the facts of this case without violating editorial freedom fully protected by the First Amendment.

[4] Petitioner has collected numerous cases in which courts, sometimes in addition to First Amendment grounds, have upheld newspapers' rejection of advertising on the basis of common law and public policy. Brief of Pet., at 14 Fn. 7. See also, Annotation 18 ALR 3d 1287 (1979).

[5] With this freedom from government regulation also goes responsibility for what is published. Due to this ultimate potential liability, among other factors, a newspaper's choice as to what is included and what is excluded involves much more than a simple decision to accept or reject an order for goods or services. Such responsibility for advertising content has been recognized directly by this Court. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

v. Tornillo, 418 U.S. 241 (1974). After fully reviewing the policy arguments in favor of compelled access to a newspaper, the Court rejected them outright and, speaking through Chief Justice Burger, declared:

> "... [A] newspaper is more than a passive receptacle for news, comment, and advertising. The choice of material to go into a newspaper ... constitutes the exercise of editorial control and judgment." 418 U.S. at 258 [footnote omitted]

Lower courts have consistently refused to grant private parties access to a newspaper's advertising columns, recognizing that *ad hoc* judicial interference with a publisher's First Amendment right to exercise its editorial discretion in the selection of advertisers is as invidious as wholesale denial of that right. See, *e.g.*, *Person v. New York Post*, 427 F.Supp. 1297 (ED NY) *affd. mem.* 573 F.2d 1294 (2d Cir. 1977); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) *cert. denied*, 430 U.S. 982 (1977) and *Wisconsin Assn. of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 709, 285 N.W.2d 891 (1979).[6]

These decisions clearly reflect the compelling nature of the First Amendment right granted a newspaper publisher to accept or reject advertising. The Court of Appeals failed to apply this right to the facts of this case and such an omission cannot be condoned by this Court.

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[6] A private plaintiff's allegation that a newspaper unlawfully restrained trade by refusing to accept plaintiff's placement service advertisement was also given short shrift by the court in *Fiorino v. Globe Newspaper Co.*, 5 Med.L.Rptr. 1988 (Mass. Super. Ct. 1979). That court treated the First Amendment as an absolute defense to the alleged trade restraint, holding, in reliance on *Miami Herald Publishing Co.*, that,

> "The United States Supreme Court has specifically afforded a newspaper absolute choice in the material which it publishes [citations omitted]" 5 Med.L.Rptr. 1988, 1989.

II. PETITIONER'S REJECTION OF ADVERTISING DID NOT VIOLATE THE ANTITRUST LAWS.

The Court below compounded its error of disregarding newspapers' First Amendment right to reject advertising by claiming that Petitioner's rejection was not within the zone of latitude in customer selection that is permitted for firms which enjoy substantial dominance in the marketplace. Brief of Pet. App. A-4, A-5. In so doing, the Court exceeded both the First Amendment rights of the newspaper and the bounds of the antitrust laws.

Newspapers must make a variety of editorial judgments concerning acceptance of advertising. On occasion, those decisions may affect categories of businesses, and may be based on knowledge of the business or on experience with its representatives. Such action is wholly consistent with decisions of this Court and lower courts construing the Sherman Act.

In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), this Court held that unilateral refusals to deal, which are reasonably ancillary to a lawful business purpose, are not condemned by the Sherman Act. The Court acknowledged that this variety of restraint is often necessary to the commercial objectives of business and is central to the system of free enterprise in the United States.

Despite numerous assaults during the intervening years, the vitality of *Colgate* remains unimpaired, and lower courts continue to approve unilateral refusals to deal that are reasonably ancillary to a lawful business purpose. Its principle has been consistently applied to the business decisions of newspapers affecting advertisers.[7]

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[7] Numerous cases have upheld newspapers' actions in dealing with advertisers, in the face of allegations of violations of Sections 1 and 2 of the Sherman Act: See, *e.g.*, *Staff Research Associates v. Tribune Co.*, 345 F.2d 372 (7th Cir. 1965) (acceptance conditioned on newspaper selection of advertising classification); *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd. per curiam*, 595 F.2d 888 (D.C. Cir. 1979) (newspaper designation of placement); *National Auto Brokers*

(footnote continues)

For newspapers, it is difficult to envision a practice more reasonably related to the purpose of the business than the adoption of a policy of excluding advertising known to pose a real or potential harm to readers.

The categories of advertisers whose material may sometimes be unsuitable for presentation in the newspaper, and therefore a source of grave concern to the publisher are numerous. These include, among others, advertising for pornographic film theaters,[8] invitations to purchase interests in litigation[9] and advertising for homosexual counseling and legal aid.[10]

A variety of reasons prompt newspapers to examine proffered material according to its general nature as well as its specific content. Important among these is the publisher's desire to protect readers from potentially harmful material placed by unscrupulous persons.[11]

(footnote continued)

Corp. v. General Motors Corp., 1980-2 Trade Cases Para. 63,337 (SD NY 1980) (policy relating to newspaper's classifications of "new" and "brand new" cars).

Other cases have held that a newspaper's degree of market power, when viewed in the light of the facts of the case, contributes significantly to a finding of a Section 2 violation. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). *Lorain Journal*, however, is distinguishable from this case on the basis of both the surrounding circumstances and the "competition" which the Court of Appeals held to exist. In *Lorain Journal*, a newspaper, with clearcut predatory intent, forced its advertisers to boycott a competing radio station. In contrast, no anticompetitive motives were present in this case. The only motive attributed to Petitioner's actions was that of preserving the newspaper editorial integrity by refusing advertising relating to a business activity for which no record of competition with the newspaper was developed.

[8] *Adult Film Association v. Times Mirror*, 97 Cal. App. 3d 77 (Cal. Ct. App. 1979).

[9] *Person v. New York Post, supra.*

[10] *Mississippi Gay Alliance v. Goudelock, supra.*

[11] Valid economic considerations might also justify exclusion of certain classes of advertising. For example, high production costs might make certain kinds of advertising unprofitable. Also newspapers must undertake to shield themselves against secondary liability for advertising material which may, for instance, be defamatory. Time constraints are an additional factor.

The Court of Appeals dismissed Petitioner's efforts in this regard as paternalistic. To the contrary, such screening is an important obligation to readers which newspapers have voluntarily assumed. Publishers generally recognize that readers rely on the newspaper for accurate commercial as well as non-commercial information.

Since publishers have the right to make judgments as to the acceptability of advertising, they must also be able to adopt policies which permit advertising decisions based on the general nature of the advertised business. Such business policies fit within the category of conduct which this Court in *Colgate* intended to be exempt from antitrust attack. See, e.g., *Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Co.*, 615 F.2d 1372 (5th Cir. 1980), *cert. denied*, 442 U.S. 912 (1980).

The *Providence Journal*, as the District Court found, approached its responsibilities in this case in a prudent manner. *Home Placement Service, Inc. v. Providence Journal Company*, Brief of Pet. App. A-16, A-18. The newspaper refused to accept the advertising at issue here based on its previous dealings with a rental referral business which offered services to the newspaper's readership that were functionally identical to those of Home Placement. As a result, the *Journal* had been subjected, *inter alia*, to complaints from irate readers; expenditures of managerial time in efforts to have the advertiser desist from its "bait and switch" tactics; and, finally, costly litigation defending its lawful actions in terminating the advertising. *Homefinders, Inc. v. Journal Co.*, 641 F.2d 441 (1st Cir. 1980).

Consequently, the *Journal* had reason to view with considerable caution the prospect of future dealings with any business selling a rental referral scheme to its readers. The final judgment was based on the publisher's assessment of prior experience, and the conclusion that it would not be in the best interest of the newspaper's readers to carry this particular advertising. A unilateral refusal to deal under these circumstances is entirely consistent with settled antitrust principles.

CONCLUSION

The opinion of the Court of Appeals amounts to an unwarranted denial of a newspaper's First Amendment right to reject advertising.

The failure of the Court to address the First Amendment issue, or to abide by other clear antitrust precedent, justifies the grant of the petition for certiorari, and remand or reversal.

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